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21967 7590 02/07/2011 HUNTON & WILLIAMS LLP INTELLECTUAL PROPERTY DEPARTMENT 1900 K STREET, N.W. SUITE 1200 WASHINGTON, DC 20006-1109			EXAMINER JAIN, RAJ K	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOZEF BABIARZ

Appeal 2009-010961
Application 10/799,703
Technology Center 2400

Before JOHN C. MARTIN, ALLEN R. MacDONALD, and
BRADLEY W. BAUMEISTER, *Administrative Patent Judges*.

Opinion for the Board filed by MacDONALD, *Administrative Patent Judge*.

Opinion Concurring filed by MARTIN, *Administrative Patent Judge*.

MacDONALD, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF CASE

Introduction

Appellant appeals under 35 U.S.C. § 134 from a rejection of claims 1-19. We have jurisdiction under 35 U.S.C. § 6(b).

Exemplary Claim(s)

Exemplary claims 1, 16, and 17 under appeal reads as follows:

1. A method for admission control of packet flows in a network, the method comprising;

initiating a flow of packets across the network;
determining a flow rate associated with a plurality of packets entering or exiting the network;

marking at least one predetermined bit in at least one of the plurality of packets if the flow rate is greater than a predetermined rate; and

controlling the initiated flow of packets across the network based at least in part on the marking of the at least one predetermined bit in the at least one of the plurality of packets.

16. At least one signal embodied in at least one carrier wave for transmitting a computer program of instructions configured to be readable by at least one processor for instructing the at least one processor to execute a computer process for performing the method as recited in claim 1.

17. At least one processor readable carrier for storing a computer program of instructions configured to be readable by at least one processor for instructing the at least one processor to execute a computer process for performing the method as recited in claim 1.

*Rejections on Appeal*²

The Examiner rejected claims 1-11 and 14-19 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Hadi Salim (US 6,625,118 B1), and Simcoe (US 7,035,220 B1).

The Examiner rejected claims 12 and 13 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Hadi Salim, Simcoe, and Davies (US 6,483,805 B1).

Appellant's Contentions

Appellant contends that the Examiner erred in rejecting claim 1 because:

(1) “Nowhere, does Hadi Salim disclose, or even suggest, ‘determining a flow rate associated with a plurality of packets entering or exiting the network,’ as presently claimed.” (App. Br. 8).

(2) “Appellant respectfully submits that Hadi Salim fails to disclose, or even suggest, ‘marking at least one predetermined bit in at least one of the plurality of packets if the flow rate is greater than a predetermined rate,’ as presently claimed.” (App. Br. 10).

(3) “Appellant respectfully submits that Simcoe teaches away from Hadi Salim.” (App. Br. 10).

² Separate patentability is not argued for claims 2-19. “A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim.” 37 C.F.R. § 41.37(c)(1)(vii)(last sentence).

Issue on Appeal

Did the Examiner err in rejecting claims 1-19 as being obvious because the Hadi Salim fails to teach or suggest claim limitations at issue?

Did the Examiner err in rejecting claims 1-19 as being obvious because Simcoe teaches away from Hadi Salim?

ANALYSIS

We have reviewed the Examiners' rejections in light of Appellant's arguments (Appeal Brief and Reply Brief) that the Examiner has erred.

We disagree with Appellant's conclusion. We adopt as our own (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken and (2) the reasons set forth by the Examiner in the Examiner's Answer (Ans. 9-12) in response to Appellant's Appeal Brief. We concur with the conclusion reached by the Examiner.

We particularly note the Examiner's reliance on the description of Hadi Salim at column 6, lines 40-45, describing Figure 4. (Ans. 9)

CONCLUSIONS

(1) The Examiner has not erred in rejecting claims 1-19 as being unpatentable under 35 U.S.C. § 103(a).

(2) Claims 1-19 are not patentable.

DECISION³

The Examiner's rejections of claims 1-19 are affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

³ Should there be further prosecution with respect to claims 16 and 17, the Examiner's attention is directed to *In re Nuijten*, 500 F.3d 1346 (CAFC 2007), and 1351 Off. Gaz. Pat. Office 212 (Feb. 23, 2010); *Subject Matter Eligibility of Computer Readable Media*.

MARTIN, *Administrative Patent Judge*, concurring.

I concur in the Decision of the Majority and add the following additional reasons in support of that position.

As correctly noted by Appellant (Br. 9-10), “Salim discloses detecting congestion by determining ‘if the average queue length is greater than a minimum threshold.’ *See, e.g.,* column 7, lines 23-24.” However, Salim also explains that “[m]any other methods could be used.” Col. 7, ll. 6-13. I address the Examiner’s reliance on other methods disclosed in Salim.

Appellant has not shown error in the Examiner’s finding (Final Action 2) that the claim 1 step of “marking at least one predetermined bit in at least one of the plurality of packets if the flow rate is greater than a predetermined rate” is taught by Salim column 1, lines 44-59. The cited lines read as follows:

Flow control relies on some sort of notification of congestion. This may be implicit or explicit. . . . One method is described in U.S. Pat. No. 5,377,327 (Jain et al) in the context of a system in which at intermediate nodes, *a flow is allocated a share of the capacity. If the allocation is exceeded, a flag is set in each packet.* The flags may be counted and if the proportion of packets with the flag set exceeds a threshold, then the flow from the source is adjusted.

(Emphasis added.) Appellant’s argument that “nowhere does Hadi Salim disclose, or even suggest, allocating a share of the capacity is a disclosure of ‘a predetermined rate,’ as presently claimed” (Br. 10) is unpersuasive because Appellant has not explained, and it is not apparent, *why* a “flow [that] is allocated a share of the capacity” (col.1, ll. 5-56) does not correspond to the recited “predetermined [flow] rate.”

Appellant likewise has failed to demonstrate error in the Examiner’s alternative reliance (Final Action 4) on Salim column 2, lines 20-30 for a

teaching of marking packets as congested based on their bandwidth usage. The Examiner made this finding in addressing claim 14, which depends on claim 1 and recites that “the predetermined [flow] rate is based on a network bandwidth allocated for the plurality of packets.” These cited lines in Salim read as follows:

Floyd discloses a methodology for doing ECN for IP. Floyd suggests the use of RED gateways to detect incipient congestion before the queue overflows. The congestion causing *packets are marked* on their way to the receiver end system (from the sender end system), *with a probability proportional to their bandwidth usage*, using the CE (Congestion Experienced) bit in the IP header.

(Emphasis added.) Appellant has not explained why this bandwidth usage does not correspond to the recited “predetermined [flow] rate.”

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HUNTON & WILLIAMS, L.L.P.
INTELLECTUAL PROPERTY DEPARTMENT
1900 K STREET, N.W.
SUITE 1200
WASHINGTON, DC 20006-1109